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VERSUS Kentucky

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Nov 5 1984	Petition DENIED. Dissenting opinion by Justice Marshall. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

NO. 83-6816

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LOUIS M. PARKER FORD,
PETITIONER

v.

COMMONWEALTH OF KENTUCKY,
RESPONDENT,

RECEIVED
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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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May 25, 1984.

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER PETITIONER, A 51 YEAR OLD BLACK MALE, HAS STANDING TO CHALLENGE THE 1) TOTAL EXCLUSION OF BLACK COLLEGE STUDENTS FROM AND 2) SUBSTANTIAL UNDERREPRESENTATION OF WOMEN AND YOUNG ADULTS IN THE GRAND JURY POOL?

II.

WHETHER THE EXCLUSION OF BLACKS AND/OR SUBSTANTIAL UNDERREPRESENTATION OF WOMEN AND YOUNG ADULTS AS JURY COMMISSIONERS FOR A 20 YEAR PERIOD IN THE COUNTY OF INDICTMENT AND A 10 YEAR PERIOD IN THE COUNTY OF TRIAL IS CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT?

III.

WHETHER PETITIONER PRESENTED PRIMA FACIE CASES OF EXCLUSION/SERIOUS UNDERREPRESENTATION OF COGNIZABLE GROUPS IN THE GRAND AND PETIT JURY POOLS AND AS JURY COMMISSIONERS IN FRANKLIN AND SCOTT COUNTIES OR, AT A MINIMUM, MADE A SUFFICIENT SHOWING TO REQUIRE THAT FUNDS FOR ADDITIONAL DATA GATHERING AND AN EXPERT ON COGNIZABILITY BE GRANTED?

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The petitioner, Louis M. Parker Ford, respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of Kentucky entered on December 22, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky affirming petitioner's conviction for murder is reported at Ford v. Commonwealth, 665 S.W.2d 304 (Ky. 1983)(Appendix, hereinafter A, 1-8).

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on December 22, 1983. Petitioner's timely petition for rehearing was denied on March 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution. The Fifth Amendment states in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury...

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to have the assistance of counsel for his defense.

The Fourteenth Amendment, Section One, states in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property without due process of law...or deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted on November 17, 1980 in Franklin County, Kentucky for the capital murder of Susanne Schick (Transcript of Record, hereinafter TR, 11). The venue was changed to neighboring Scott County. After two and a half days of deliberation, the jury, on October 27, 1981, convicted petitioner of murder (Transcript of Evidence, hereinafter TE, XV 31-34). Following a presentence hearing, the jurors recommended a life sentence which the judge imposed (TE XVI, XVII 79).

Petitioner is a black male who was 51 at the time of the charged offense. Because of his indigency he was represented by appointed counsel. Petitioner raised the following pertinent (six) challenges to the grand jury selection process in Franklin County: (1) exclusion of black Kentucky State University students from and substantial underrepresentation of (2) females (3) and young adults in the grand jury pool and (4) exclusion of blacks and substantial underrepresentation of (5) females and (6) young adults as jury commissioners for twenty years. Petitioner offered proof that none of 1599 prospective jurors drawn from the jury pool for the three year period 1977 through 1979 or the 100 randomly selected from those drawn in 1980 had a Kentucky State University (KSU) address. Full time KSU students, most of whom are black, make up more than five percent of the Franklin County population eligible for jury service (TR VIII 1169, 1188) and the voter registration list (used as the source list as required by statute, KY.REV.STAT. 29A.040(1)) contains numerous KSU students (all black) identifiable by their dormitory address. The list contains sex, race and date of birth of each voter (Exhibit 1, Hearing on Dec. 8, 1981).

Petitioner also presented the testimony and report of a statistician, Dr. Edgell, for whose services the trial court had granted funds. Dr. Edgell concluded by comparing the characteristics of random samples of the 1979 and 1980 jury pools with the characteristics of Franklin County citizens age 18 and over that the underrepresentation of women and young adults in the jury pool was statistically significant and that of nonwhites was close to significance[1] (TR VIII 1163-1168). Petitioner's public defender counsel, who had exhausted their time and resources, requested funds for additional data gathering assistance and for testimony by an expert on youth/college students as cognizable groups if the trial court did not believe their proof was adequate to require some response from the prosecution. Funds were denied. Finally, petitioner offered evidence that of the 63 Franklin County jury commissioners chosen by circuit judges from 1960-1980 none were black, only four were female and few were under 30. The Commonwealth offered no rebutting proof of any kind.

After the venue was changed to Scott County, petitioner drew random samples of the 1980 and 1981 jury pools and reviewed the available list of Scott County jury commissioners from 1971 through 1981. Dr. Edgell once again concluded through hypothesis testing that (1) women and (2) young adults were very significantly underrepresentated in the jury pools (TR X 1435-1436). Counsel's request for additional funds if the trial court believed their proof was deficient to constitute a prima facie case was again denied. Similar claims of underrepresentation as to (3) women and (4) young adults were made as to the jury commissioners. Proof that of the 33 jury commissioners over the last decade only 4 were women and none were under 30 was submitted (TR X 1454-1455). The Commonwealth again offered no evidence.

Following the evidentiary hearing on the challenges to the Franklin and Scott County jury selection systems, the trial judge concluded that petitioner had failed to show any group was systematically excluded in Franklin County and noted that there may have been KSU students in the jury pool who were not in the random sample (TH II 263-265).[2] Noting his surprise that females

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[1]Dr. Edgell noted that only the grossest disparity appears with a sample of 100; he believed that with a random sample of about 300 "race would quite likely show significant differences" (TR VIII 1165).

[2]The judge did not comment on the years 1977-1979 when counsel examined all veniremen drawn from the drum for KSU addresses. Not a single KSU resident student was drawn from the jury wheel during these three years.

this case must be measured solely by the general Fourteenth Amendment guarantees of due process and equal protection... [W]e turn now to the commands of equal protection and due process." 407 U.S. at 496. (emphasis added). Moreover, the defendant in Peters, a white, challenged the exclusion of blacks from the grand jury as well as the petit jury. 407 U.S. at 494. The Court held that "when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim." 407 U.S. at 498.

Petitioner's challenge to the grand jury pool was based on both the due process and equal protection clauses of the Fourteenth Amendment. Rose v. Mitchell, 443 U.S. 545 (1979) and Castenada v. Partida, 430 U.S. 482 (1977), cited by the Kentucky Court, are not on point since the defendants raised only equal protection claims and Mitchell involved solely a challenge to the foremen, not the grand jury itself. Alexander v. Louisiana, 405 U.S. 625 (1972), also cited by the Kentucky court, is irrelevant because this Court did not reach the standing issue and the decision was prior to Peters.

There is a split among the lower state and federal courts on this important standing issue. In Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983) the United States Court of Appeals for the Eleventh Circuit allowed a male's challenge to the underrepresentation of women in the grand jury pool, affirming the District Court's granting of a writ of habeas corpus because the grand and petit juries were unconstitutionally composed. However, the same year the Supreme Court of Tennessee held that a male does not have standing to challenge the underrepresentation of females in the grand jury pool. State v. Coe, 655 S.W.2d 903 (Tenn. 1983). Significantly, the Tennessee Court, like the Kentucky Supreme Court, cited Alexander v. Louisiana and ignored Peters v. Kiff.

Petitioner, a black man, was not permitted to challenge the exclusion from Franklin County grand jury pools of black students at KSU, the historically black Kentucky university. Nor

was he allowed to contest the serious underrepresentation of women and young adults age 18 through 29. Certainly the due process cause of the Fourteenth Amendment, embodying principles of fundamental fairness, requires that these distinctive and constitutionally cognizable groups not be systematically barred from or systematically underrepresented in grand jury pools, regardless of "the circumstances of the person making the claim." Peters v. Kiff, 407 U.S. at 498. This Court should grant review of the Kentucky Supreme Court's decision that petitioner lacked standing to challenge omission/underrepresentation of the groups in question since that opinion is inconsistent with Peters v. Kiff and there is a conflict among the lower state and federal courts on the question.

II.

PETITIONER'S CHALLENGE TO THE COMPOSITION OF THE JURY COMMISSIONERS PRESENTS A NOVEL AND CRUCIAL CONSTITUTIONAL ISSUE, IS CONSISTENT WITH THE RATIONALE OF CARTER V. JURY COMMISSION OF GREENE COUNTY, AND IS RELATED TO THE ISSUE PRESENTLY BEFORE THE COURT IN HOBBY V. UNITED STATES.

Petitioner challenged the absence of blacks, the only token representation of women and the substantial underrepresentation of young adults on the panels of jury commissioners for a twenty year period in Franklin County.[6] He also contested the exclusion of young people and serious underrepresentation of women as jury commissioners in Scott County for a decade.[7] The Kentucky Supreme Court said the Franklin County challenge "does not contain either substance or merit" (A 5) and ignored the Scott County challenge. That court's decision is contrary to the due process and equal protection clauses of the Fourteenth Amendment as well as the rationale of Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970).

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[6]Of the 63 jury commissioners chosen from 1960-1980 none were black, four were female and few were under 30.

[7]Of the 33 jury commissioners selected from 1971-1981 none were under 30 and only four were women.

Kentucky employs a jury commissioner system to select pools of prospective jurors. KRS 29A.030(1) requires that the circuit judge appoint three jury commissioners each year to choose a specified number of veniremen tied to a the county's population. KRS 29A.050. The statute contains no standards or guidelines about how the commissioners are to perform that task except to specify that voter registration and property tax rolls are the source lists. KRS 29A.040(1)[8]

The Franklin County jury commissioners from 1960-1980 are not representative of the Franklin County population. There were 63 jury commissioners during those two decades. All were white, and only four were female (TR X 1349-1350). Moreover, the commissioners were generally older adults (TR X 1349-1350). Significantly, the commissioners from 1979 and 1980 were, without exception, older white men (the youngest being approximately 55) (TR X 1350). The absence of female, nonwhite and young jury commissioners accounts for the unrepresentative jury pool.

This Court has "assumed" that "the State may no more exclude Negroes from service on the jury commission because of their race than from the juries themselves." Carter v. Jury Commission of Greene County, 396 U.S. 320, 338 (1970). Petitioner urges that the due process and equal protection clauses of the Fourteenth Amendment require that identifiable groups of citizens not be excluded from service as jury commissioners. Nonwhites have been totally excluded from jury commissions for twenty years although nearly one tenth of the eligible population is nonwhite. Females are a majority of the eligible pool but less than six percent of the group of jury commissioners. The exclusion/underrepresentation of these two cognizable groups is obvious.

The figures for Scott County are also telling. Over the last decade, females, who are 53 percent of the eligible population, have made up only twelve percent of the commissioners. Young adults, one third of the eligible jurors, have been totally

[8]KRS 29A.030(5)(a)(eff. 10-1-82) now provides that the master list consists solely of the voter list.

excluded from the ranks of jury commissioners. The underrepresentation of women and exclusion of young adults as jury commissioners over time explains the underrepresentation of those groups in the jury pools.

In a system such as Kentucky's the position of jury commissioner has critical importance. These "key men" select their fellow citizens who will serve on grand and petit juries and reliance on the voter list, with its designations of sex, race and date of birth, is certainly a procedure susceptible to abuse. See Castenada v. Partida. The unrepresentative nature of the jury commissions in both Franklin and Scott Counties is no doubt responsible for the skewed composition of the jury pools. Fundamental fairness demands that cognizable groups not be omitted/grossly underincluded in the jury commissions.

An analogous issue is presently pending before this Court. In United States v. Hobby, 702 F.2d 466, 470 (4th Cir. 1983), cert. granted 104 S.Ct. 547 (1983), the question presented is whether "ddiscrimination in the selection of grand jury foremen" is a constitutional violation. Obviously, "discrimination" in the appointment of jury commissioners presents a far more compelling issue.

This Court should grant review of the Kentucky Supreme County's decision that petitioner's challenge to the composition of jury commissions lacked substance or merit because of the novelty of petitioner's claim, the conflict of the opinion with the rationale of Carter v. Jury Commission of Greene County and the pendency before the court of a related issue.

III.

THE OPINION BELOW REGARDING THE ABSENCE OF A PRIMA FACIE CASE AND THE PROPRIETY OF DENYING FUNDS IS INCONSISTENT WITH DUREN V. MISSOURI, TAYLOR V. LOUISIANA, DECISIONS OF THE LOWER FEDERAL COURTS AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Petitioner presented data regarding the exclusion of KSU students from Franklin County jury pools for a four year period. All other information was based on random samples of jury pools

for a two year period in Franklin and Scott Counties. Dr. Edgell, the statistician, found the underrepresentation of women and young adults statistically significant in both counties based on the two year sampling period.

The Kentucky court held that two years does not constitute a significant period of time "as would satisfy the directives of Moultrie [v. Martin, 690 F.2d 1078 (4th Cir. 1982)] and Castenada" (A 4). Neither Moultrie nor Castenada attempts to define "significant period." However, this Court and the federal circuit courts of appeal have upheld challenges to jury pools based on data for less than two years. Duren v. Missouri, 439 U.S. 357 (1979)(one year); Taylor v. Louisiana, 419 U.S. 522 (1975)(one year); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982)(20 months). See also Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982)(three years). Moreover, in any event, appellant requested the trial court to provide funds for expert assistance from the National Jury Project if the court believed his proof was deficient (TR VIII 1142-6). Samples for four previous years in Franklin County had been drawn, but data was incomplete (TR VIII 1190-1). The request was denied. At a minimum, petitioner had made a sufficient showing to require funds for further data gathering. State v. Anaya, 438 A.2d 892 (Me. 1981).

Again relying on Moultrie, the Kentucky court concluded that the percentage of a group in the jury pool must be compared with the percentage on the voter and tax rolls. The court states that petitioner's "basis for comparison...was the U.S. Census for 1970, which furnished data on the total population of the county, without regard for jury eligibility" [A 4]. Actually, petitioner furnished figures only for the adult (over 18) population of the county. This group does constitute the pool for eligible jurors. KRS 29A.080(2) prescribes the qualifications for jury service and being a voter or property tax owner is not required. The voter and tax rolls are simply the master list to be used by the jury commissioners. KRS 29A.040.

Duren is exactly on point. Missouri selected jurors from the voter registration list, and the Missouri Supreme Court

questioned the use of census figures since they "might not precisely mirror the percentage of women registered to vote." 439 U.S. at 363. This Court noted that the Missouri court's speculation was "belied by" a census report showing that in the year after Mr. Duren was indicted 69.9% of the women and 71.1% of the men in Missouri were registered to vote. 439 U.S. at 365 n.22.[9] This Court emphasized:

> In any event, the fair cross-section requirement involves a comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup of the community, not of voter registration lists. 439 U.S. at 365 n.23; emphasis in original.

Duren is dispositive and consistent with all other decisions on the subject except Moultrie. In Alexander, 405 U.S. at 627; Castenada, 430 U.S. at 495; Gibson v. Zant, 705 F.2d at 1545 n.2; Machetti, 679 F.2d at 240; Hillery v. Pulley, 563 F.Supp. 1228, 1231-2 (E.D.Ca. 1983), the courts accepted comparison of the jury pools with the adult population contained in the Census.

Relying on the decisions of this Court, petitioner presented data which he believed to constitute a prima facie case of unconstitutional exclusion/underrepresentation of cognizable groups in the Franklin and Scott County jury pools. He requested funds for further data gathering and expert testimony on cognizability if the court believed he had not met his burden of proof, but the court denied funds. Petitioner submits that this Court should grant review of the decision of the Kentucky Supreme Court to provide further guidelines on what constitutes a prima facie case and when funds for additional investigation/expert testimony must be provided to an indigent to complete an apparently valid prima facie case.

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[9] A similar report reveals that in Kentucky 71.5% of adult women and 72.3% of adult men were registered to vote as of December 1983. Voter Registration Statistics Report (State Board of Elections December 9, 1983). Moreover, the 1980 Census of Kentucky, now available, reveals that the percentage of women and non-whites in the population has remained nearly steady. Kentucky Demographics: The 1980 Census of Kentucky (January 1982).

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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APPENDIX

No. 83-6816

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

PAGES A-1 thru A-8 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Louis M. Parker FORD, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Supreme Court of Kentucky.

Dec. 22, 1983.

Rehearing Denied March 29, 1984.

Defendant was convicted before the Circuit Court, Scott County, Robert Hall Smith, J., of capital murder, and he appealed. The Supreme Court, Gant, J., held that: (1) even accepting period of two years upon which defendant based random sampling of jury panels as significant or accepting census report as statistical basis for comparison, defendant failed to make prima facie case of racial discrimination in selection of grand jurors; (2) defendant failed to prove prima facie case of underrepresentation of women in selection of petit jurors; (3) employment of statisticians and mathematicians to examine representation of recognizable groups on jury venires is not included within "necessary services" under statute providing for assistance to needy persons; (4) evidence was sufficient to support conviction; (5) trial court did not abuse its discretion in permitting state serologist to give his opinion as expert; and (6) assuming that lab technicians' conduct in comparing victim's blood with that found on defendant's shirt was both wasteful and negligent, it did not rise to denial of due process under the circumstances.

Judgment affirmed.

Leibson, J., filed dissenting opinion.

1. Constitutional Law ⇐250.3(1)

Grounds for challenge to composition of grand jury panel lie in equal protection clause of Fourteenth Amendment and not in due process requisites of Fifth and Sixth Amendments. U.S.C.A. Const.Amends. 5, 6, 14.

2. Grand Jury ⇐2½

Where defendant was male penitentiary inmate, over 50 years of age, his complaint that women, young adults and college students were underrepresented on grand jury panel would not be considered. U.S.C.A. Const.Amend. 14.

3. Grand Jury ⇐2½

In relying on statistical data to establish racial discrimination in method of selection of grand jurors, defendant carried burden to establish prima facie case under guidelines set out in federal cases. U.S.C.A. Const.Amend. 14.

4. Grand Jury ⇐2½

Period of two years of random sampling of jury panels on which defendant based his statistical data to establish racial discrimination in method of selection of grand jurors was not "period of significance," such as would satisfy guidelines set out in federal cases for establishing prima facie case. U.S.C.A. Const.Amend. 14.

5. Grand Jury ⇐2½

To establish racial discrimination in selection of grand jurors by statistical data, defendant could not base comparison between number of blacks contained in random samples of jury panels on census which furnished data on total population of county without regard for jury eligibility. U.S.C.A. Const.Amend. 14.

6. Grand Jury ⇐2½

Absent statistics reflecting black voters or black property owners, there was no basis for application of formula reflecting standard deviation analysis and hypothesis testing to establish racial discrimination in selection of grand jurors. U.S.C.A. Const. Amend. 14; KRS 29A.040.

7. Grand Jury ⇐2½

Defendant failed to establish prima facie case of racial discrimination in selection of grand jurors where defendant's statistical expert testified that none of mathematical analyses for race "reached significance." U.S.C.A. Const.Amend. 14.

8. Jury ⇐33(1.1)

Statute directing that master list from which names of prospective jurors would be elected consist of voter registration lists and property tax rolls for county represented effective manner by which to insure representative jury panels from segments of community and was constitutional, notwithstanding exclusion of otherwise eligible jurors who did not register to vote nor own property. KRS 29A.040; U.S.C.A. Const.Amend. 14.

9. Grand Jury ⇐2½

Defendant's references to color of jury commissioners, who were selected by circuit judges, and of grand jury foremen, who were elected by other members of their group, were insufficient to place stamp of racial discrimination on selection of grand jurors. KRS 29A.040; U.S.C.A. Const.Amend. 14.

10. Constitutional Law ⇐267

Selection of petit jury panels is subject to due process provisions of Federal and State Constitutions. U.S.C.A. Const. Amends. 5, 6, 14.

11. Jury ⇐33(1.1)

Petit jurors must be drawn from fair cross section of community. U.S.C.A. Const.Amends. 5, 6, 14.

12. Jury ⇐33(1.2, 1.4)

Young adults and college students, whether considered as one group or two, are not distinctive or cognizable as a class for purpose of determining whether petit jurors are drawn from fair cross section of community. U.S.C.A. Const.Amends. 5, 6, 14.

13. Jury ⇐33(1.5)

Absent ratio comparing random sampling of jury pool over two-year period with actual number of women eligible to serve under statutory requirements, defendant failed to prove prima facie case of underrepresentation of women in selection of petit jurors. U.S.C.A. Const.Amends. 5, 6, 14.

14. Costs ⇐302.2(2)

Employment of statisticians and mathematicians to examine representation of recognizable groups on jury venires is not included in "necessary services" under statute providing for assistance to needy persons charged with a crime to provide them with "necessary services," especially in absence of specific knowledge of irregularities. U.S.C.A. Const.Amends. 5, 6, 14; KRS 31.110.

15. Homicide ⇐253(1)

Evidence was sufficient to support defendant's capital murder conviction.

16. Criminal Law ⇐553(2)

To sustain conviction, circumstantial evidence must be of such nature that based upon the whole case it would not be clearly unreasonable for jury to find defendant guilty beyond a reasonable doubt.

17. Criminal Law ⇐626

Trial court did not abuse its discretion in permitting state serologist, who examined hole apparently punched into wall during murder and skin discovered therein, to testify and give his opinion as an expert that there was little chance that skin pieces found at scene could have come from anyone but the defendant where witness was forensic serologist, who identified and tested biological materials, working with microscopic comparisons for size, quantity and quality, and surgeon testifying for defendant virtually destroyed serologist's testimony by testifying that matching was impossible as skin tissue, once removed, would shrink and wound would enlarge.

18. Criminal Law ⇐627.6(5)

General order requiring Commonwealth to furnish results of scientific tests or experiments did not entitle defendant to relief under rule on ground of surprise when state serologist testified at trial that there was little chance that skin pieces found in hole in wall at murder scene could have come from anyone but defendant where deposition of serologist was taken prior to trial. Rules Crim.Proc., Rule 7.24(9).

19. Constitutional Law ⇐257.5

Assuming that conduct of lab technicians, who failed to make simple test which possibly could have disclosed whether blood on defendant's shirt came from a black, such as defendant, or a white, such as the victim, was both wasteful and negligent, technicians' testing processes did not rise to point of denial of due process where it was admitted that testing methods utilized by state laboratory were proper, and similarity found between defendant's and victim's blood type and enzymes was common to 60 million people, so that blood tests were so inconclusive as to constitute little of value. U.S.C.A. Const.Amend. 14.

Jack Emory Farley, Public Advocate, Kevin McNally, M. Gail Robinson, Asst. Public Advocates, Frankfort, for appellant.

Steven L. Beshear, Atty. Gen., Mary D. Schoening, Asst. Atty. Gen., Frankfort, for appellee.

GANT, Justice.

Appellant was convicted of capital murder in the death of Susanne Schick, which murder occurred as a result of beating and stabbing on September 11, 1980. At the time of the murder, appellant was an inmate at LaGrange Reformatory but was housed in a dormitory in Frankfort and working as a trusty about the grounds of the capital and the governor's mansion. The murder occurred in the immediate vicinity of the dormitory and the victim's home near there. The appellant was sentenced to life imprisonment.

The other facts of this case will be discussed as necessary if they pertain to issues presented for argument by the appellant.

GRAND JURY SELECTION

[1, 2] Appellant was indicted in Franklin County, the county of the offense, and he raises several issues concerning the composition of the grand jury, contending that the pool from which the grand jury was selected in that county did not represent a fair cross section of the community. He complains that women, young adults and college students were underrepresented on the panel. It should be first noted that the grounds for challenge of the composition of a grand jury panel lie in the equal protection clause of the Fourteenth Amendment and not in the due process requisites of the Fifth and Sixth Amendments. *See Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). Inasmuch as the appellant is a male penitentiary inmate, over 50 years of age, his complaint that women, young adults and college students were underrepresented on the panel does not merit our consideration.

[3] However, as appellant is a black, we must examine appellant's complaint of underrepresentation by nonwhites. There is absolutely no showing herein, by any direct evidence whatsoever, of any racial discrimination in the method of selection of grand jurors. However, the federal decisions have enshrined the statistician on the throne of expertise, and it is on statistical data alone that the appellant relies. *See Castaneda v. Partida, supra.* In so relying, the appellant carries the burden to establish a prima facie case under the guidelines set out in the federal cases, and an excellent dissertation on that burden is contained in *Moultrie v. Martin*, 690 F.2d 1078, 1081 (4th Cir.1982):

> In order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. *Hernandez v. Texas*, 347 U.S. 475, 478–479, 74 S.Ct. 667, 670, 671, 98 L.Ed. 866 (1954). Next the degree of underrepresentation must

> be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. (Case citations omitted). This method of proof, sometimes called the "rule of exclusion," has been held to be available as a method of proving discrimination in jury selection against a delineated class. (Citation omitted). Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. (Citations again omitted). Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut the case.

[4, 5] As heretofore stated, the appellant has taken the first step because he is black, and thus a member of a "recognizable, distinct class, singled out for different treatment under the laws." However, striding up the next two steps is fraught with opportunity to trip when employing raw statistical data. In the case before us, the appellant has exhibited two distinct stumbling blocks. First, his statistical data was based on random sampling of jury panels for a period of two years, which period we do not feel constitutes a period of significance such as would satisfy the directives of *Moultrie* and *Castaneda, supra.* Additionally, the basis for comparison between the number of blacks contained in the random samples was the U.S. census for 1970, which furnished data on the total population of the county, without regard for jury eligibility. This comparison was specifically condemned in *Moultrie v. Martin, supra*, in which the court stated:

> First, the petitioner utilized the percentage of blacks in Colleton County (47%) as the statistic for comparison with the percentage of blacks actually on the grand juries. The use of this statistic for this purpose is inappropriate because the grand jury membership was based on the county voting rolls.

[6] KRS 29A.040, as then in effect, directed that the master list from which names of prospective jurors shall be selected shall consist of the voter registration lists and the property tax rolls for the county. We have been furnished with no statistics reflecting black voters or black property owners, so there is no basis upon which we can apply any formula reflecting a standard deviation analysis and hypothesis testing. *See Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), and *Moultrie v. Martin, supra.*

[7] Even should we accept the period of two years as significant or accept the census report as a statistical basis for comparison, the appellant has failed to make a prima facie case. As the *Moultrie* court stated:

> When a litigant seeks to prove his point exclusively through the use of statistics, he is borrowing the principles of another discipline, mathematics, and applying these principles to the law. In borrowing from another discipline, a litigant cannot be selective in which principles are applied. He must employ a standard mathematical analysis. Any other requirement defies logic to the point of being unjust.

In the instant case, the appellant utilized a statistical expert, who employed the standard mathematical analyses and who testified that *none* of the analyses for race "reached significance."

[8] In passing, appellant contends that KRS 29A.040 is unconstitutional on the ground that many otherwise eligible jurors are excluded because they do not register to vote, nor do they own property. No authority is cited other than a report on a project of the League of Women Voters, referred to in 2 Black L.J., 164, 165 (1972). It is our opinion that KRS 29A.040 is constitutional, representing an effective manner by which to insure representative jury panels from segments of the community. Cf. *Sims v. Georgia*, 389 U.S. 404, 88 S.Ct.

523, 19 L.Ed.2d 634 (1967), and *Jones v. Georgia*, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967).

[9] Appellant's attempt to place the stamp of discrimination by reference to the color (white) of the jury commissioners, who are selected by circuit judges, and of grand jury foremen, who are elected by the other members of their group, does not contain either substance or merit.

PETIT JURY SELECTION

[10, 11] This case was tried in Scott County, upon change of venue, and appellant continues his attack upon jury selection, this time in reference to the petit jury. He again complains of underrepresentation of women, young adults and college students. It is in the selection of petit jury panels that the due process provisions of the federal and state constitutions appear, and it is required that petit jurors be drawn from a fair cross section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). However, the application of those due process provisions is defined in *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979), in which the court stated:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which the juries are selected is not fair and reasonable in relation to the numbers of such persons in the community; and (3) that the underrepresentation is due to the systematic exclusion of the group in the jury-selection process.

[12] In applying this prescribed test, we first hold that young adults and college students, whether we consider them as one group or two, are not distinctive or cognizable as a class. The terminal ages of "young adults" defy definition, and we know of no end to the maze that could be created by classifying jurors as young adults, middle-aged adults, elderly adults, and on and on. We find no recognition of such class in the law or special legislation applying thereto; we find no special characteristics, interests or cohesive traits that merit such a position as that advocated by the appellant. We cast our lot with the majority of federal and state authority. *See Brown v. Harris*, 666 F.2d 782, 783 (2d Cir.1981), and *United States v. Kleifgen*, 557 F.2d 1293, 1296 (9th Cir.1977).

[13] Women, of course, do constitute a distinctive group under the law, but again we are furnished with no direct proof which would create a prima facie case of underrepresentation. Again, appellant relies totally on statistical data and again he utilizes random sampling of the jury pool over a two-year period, comparing that sample with the 1970 census of the county, which he mistakenly categorizes as the "eligible population." As we have previously indicated, KRS 29A.040, has fixed the eligible population for jury service as registered voters and property owners. We simply have no ratio afforded us between the random sampling and the actual number of women eligible to serve under the statutory requirements. Without a proper standard for comparison, we cannot find significant underrepresentation in the instant case. Also, again, the two-year sampling does not qualify as a significant period of time as required by *Castaneda*.

Thus, it is our opinion that, under the method utilized by the appellant, he has failed to raise a presumption which would create a prima facie case of discrimination by his use of raw statistical data. He has presented us with no law which has singled out a recognizable distinct class for different treatment, either as written or applied; he has failed to prove underrepresentation at all, much less for a significant period of time; and has demonstrated no selection procedure which is susceptible to abuse or is not racially neutral, all of which factors are required by *Castaneda v. Partida*, *supra*.

Appellant next contends that he was improperly denied funds for the employment

of an additional expert statistician. He presents us with no showing that the results reached by an additional expert would have differed, in any respect, with the results reached by the expert he did retain, and this is without merit.

[14] Additionally, the statute (KRS 31.110) providing for assistance to needy persons charged with a crime states that such persons are entitled to be provided with "necessary services ... including investigation and other preparation." We do not conceive that employment of statisticians and mathematicians to examine the representation of recognizable groups on jury venires, especially in the absence of specific knowledge of irregularities, to be included in "necessary services." We know of no statute or principle which would authorize expenditures of public funds to conduct a witch hunt. Cf. *Gilliam v. Commonwealth*, Ky., 652 S.W.2d 856, 858 (1983).

TRIAL

[15, 16] Appellant next assigns several trial errors as grounds for reversal. He first argues that there was insufficient evidence to sustain his conviction. We disagree. Worded simply, the standard to which circumstantial evidence must conform is that it be of such nature that based upon the whole case it would not be clearly unreasonable for the jury to find the defendant guilty beyond a reasonable doubt. Cf. *Nugent v. Commonwealth*, Ky., 639 S.W.2d 761 (1982), and *Trowel v. Commonwealth*, Ky., 550 S.W.2d 530 (1977). We have scrutinized the voluminous evidence herein and find it sufficient under that standard.

Certain scientific evidence on behalf of the Commonwealth was presented, primarily by two witnesses. Bedclothing, shoes, socks, pajamas and a T-shirt were found in appellant's room, which articles contained bloodstains. Possible presence of blood was found on appellant's hands, and a knife was discovered in the laundry room where the appellant worked. At the crime scene, a hole was discovered in the wall which had apparently been punched into it during the murder, in which hole skin tissue was discovered. Appellant was discovered to have lacerations on his left hand, with missing skin tissue, and abrasions and contusions on his left upper arm. Appellant's explanation of the cuts and missing skin was that he had been scratched by a cat.

David Alford, the state serologist, testified that he had examined the hole made in the wall and had discovered skin tissue there in two locations, upon which tissue he had done some enzyme testing and had measured the tissue. He then testified that he had examined the hands of the appellant, noting a missing piece of skin upon the middle finger of the left hand and a scraping on another part of the hand. He was then permitted to give his opinion, over objection, that there was little chance that the skin pieces found at the scene could have come from anyone but the appellant. To illustrate his testimony, Alford used a cast of the appellant's hand and an enlarged photograph of the hole in the wall.

In relation to this evidence, appellant asserts three errors, to-wit: (1) Alford was not qualified as an expert to express his opinion; (2) there was prejudicial surprise, and (3) no foundation was laid for the use of the exhibits.

[17] On the question of experts, it has long been the law of this jurisdiction that the decision as to the qualifications of an expert rests in the discretion of the trial court. *Kentucky Power Company v. Kilbourn*, Ky., 307 S.W.2d 9, 12 (1957). Alford is a forensic serologist, who identifies and tests biological materials, working with microscopic comparisons for size, quantity and quality. Appellant frankly admits that he knows of no one who engages in the profession of matching skin tissue against holes. Additionally, a well qualified surgeon, testifying for the appellant, virtually destroyed the testimony of the state serologist and testified that matching was impossible, as the skin tissue, once removed, would shrink and the wound would

enlarge. However, it is our opinion that Alford presented sufficient qualifications to the court that there was no abuse in the discretion of the trial judge in permitting him to testify and give his opinion as an expert.

[18] The contention regarding surprise is without merit. Appellant had conducted a lengthy pre-trial deposition of Alford and did not ask Alford about any comparative measurements nor is there any evidence that Alford deliberately withheld anything. A general order requiring the Commonwealth to furnish the results of scientific tests or experiments does not avail the appellant to relief under RCr 7.24(9), where an actual deposition was taken. This is not a "surprise" witness but one who testified at his deposition that he had, in fact, discovered the skin tissue and measured it. He was never asked if he had compared those measurements with the appellant's wounds. Further, we see no manner in which the alleged surprise was injurious to this appellant.

In regard to the exhibits utilized by Alford, there was no objection made to the use of the enlarged photograph and a qualified witness (the state pathologist) thoroughly authenticated the cast of the hand. There is, additionally, no contention that either exhibit was inaccurate.

[19] Appellant next contends that he was denied due process by alleged wasteful and negligent testing processes used by the lab technicians who sought to compare the victim's blood with that found on the appellant's T-shirt. If, for the sake of argument, we agree with the appellant that the conduct was both wasteful and negligent, it did not rise to the point of denial of due process under the circumstances of this case. First, it is admitted that the testing methods utilized by the state laboratory were proper. They did fail to make a simple test which possibly could have disclosed whether the blood came from a black, such as the appellant, or a white, such as the victim. Both the appellant and the victim had the same type blood—Type O—with similar enzymes, but that similarity was common to 60 million people. In short, the blood tests were so inconclusive as to constitute little of value. Appellant seeks to rely upon *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which case is not in point and merely holds that suppression of exculpatory evidence is fatal. Here there is no showing that any such evidence was suppressed.

The remaining assignments of error are without merit, and we will not comment thereon.

The judgment is affirmed.

All concur except LEIBSON, J., who dissents and files herewith a dissenting opinion.

LEIBSON, Justice, dissenting.

Respectfully, I dissent. Ford was substantially prejudiced by the state serologist's testimony in this case. Speaking as an "expert," the serologist stated his opinion that skin specimens found at the crime scene matched abrasions on Ford's hand and likely came from Ford. It was reversible error to permit such testimony regarding an ultimate conclusion only the jury could reach.

In *O'Connor & Raque Co. v. Bill*, Ky., 474 S.W.2d 344, 347 (1971), we note that "an expert may be of great assistance to the jury in providing information without expressing an opinion on the ultimate factual issue involved in the litigation." We held inadmissible the testimony of an architect that the condition of a doorway was unsafe, because to permit such testimony "would be to allow the witness to take the place of the jury." *Id.* That principle was violated in the present situation.

The present case is analogous to cases where police officers have been limited in their testimony to describing skid marks and debris because they were not qualified to express a conclusion as to the point of impact of two vehicles. Cf. *Alexander v. Swearer*, Ky., 642 S.W.2d 896 (1982) and *Southwood v. Harrison*, Ky.App., 635 S.W.2d 706 (1982). Expert testimony is

properly limited by the extent of the expertise.

So, likewise, in this case the serologist could testify to the underlying facts that skin specimens were removed from a hole in the plasterboard wall and as to his measurements of these specimens against the abrasions observed on Ford's hand. But he should not have been allowed to state his conclusion that the skin likely came from Ford. His conclusions were poorly conceived, beyond his limited expertise, and directed at ultimate facts that were for the jury to decide. Nevertheless, they had the potential for being very damaging evidence in the eyes of the jury. I would reverse.

KENTUCKY BAR ASSOCIATION, Complainant,
v.
James R. REID, Respondent.

Supreme Court of Kentucky.

March 8, 1984.

Disciplinary proceeding was brought. The Supreme Court, held that closing law office and moving out of state, without informing clients, without refunding unearned portion of their fees, or withdrawing as counsel in pending cases, warrants three-year suspension.

Three-year suspension ordered.

Attorney and Client ⇐58

Closing law office and moving out of state, without informing clients, without refunding unearned portion of fees, or withdrawing as counsel in pending cases, warrants three-year suspension.

Bruce K. Davis, Director, Michael M. Hooper, Asst. Director, Kentucky Bar Ass'n, Frankfort, for complainant.

James R. Reid, pro se.

Edna Emary, Livingston, for respondent.

OPINION OF THE COURT

This is a disciplinary case in which the Board of Governors found respondent guilty of unethical and unprofessional conduct tending to bring the bench and bar into disrepute. The Board of Governors recommended suspension from the practice of law for a period of three years.

The respondent closed his law office and moved to Montana. There are four instances of litigation where respondent had accepted employment, been paid a fee, and did not inform his clients that he was leaving. Respondent did not inform opposing counsel and failed to file motions to withdraw as counsel in these four cases. Respondent did not refund to these clients the unearned portion of the fee which had been paid.

Further there were nineteen other cases on the docket in which respondent was counsel of record and failed to file a motion to withdraw.

The local bar association made every possible effort to minimize any damage occasioned by the respondent leaving his clients without representation.

We have reviewed the entire record and are of the opinion the respondent has behaved in a manner constituting unethical and unprofessional conduct tending to bring the bench and bar into disrepute.

Respondent here breached the duty of fidelity to the cause of his client which is required of all members of the bar in this jurisdiction.

The respondent has made no reply to the charges filed against him or to the recommendation of the Board of Governors.

We accept the recommendation of the Board of Governors, and accordingly, it is ordered that the respondent be and he is hereby suspended from the practice of law

SUPREME COURT OF KENTUCKY

FILE NO. 82-SC-431-MR

LOUIS M. PARKER FORD — APPELLANT

VS. — APPEAL FROM SCOTT CIRCUIT COURT
HON. ROBERT HALL SMITH, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

PETITION FOR REHEARING

M. GAIL ROBINSON
ASSISTANT PUBLIC ADVOCATE

KEVIN MICHAEL McNALLY
ASSISTANT PUBLIC ADVOCATE

STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
(502) 564-5226 or 564-5255

CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Petition for Rehearing for Appellant, has been mailed, postage prepaid, to Hon. David L. Knox, Judge, Scott Circuit Court, Scott County Courthouse, Georgetown, Kentucky 40324; Hon. Morris Burton, Commonwealth's Attorney, 302 McClure Building, Franklin County Courthouse, Frankfort, Kentucky 40601; and Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601, this 11th day of January, 1984. I further certify that the record on appeal has been returned to the Clerk of this Court.

M. Gail Robinson

PURPOSE OF THIS PETITION

The purpose of this Petition is to present the legal and factual reasons why this Court should order a rehearing in appellant's case at least on Issues I-V, VII-IX and, in fact, the entire case.

ARGUMENTS

I.

THIS COURT HAS MISCONCEIVED BOTH THE LAW AND THE FACTS APPLICABLE TO THE ISSUE OF WHETHER THE INDICTMENT SHOULD BE QUASHED SINCE THE JURY POOL EXCLUDED KENTUCKY STATE UNIVERSITY STUDENTS AND SUBSTANTIALLY UNDERREPRESENTED WOMEN, YOUNG ADULTS AND NONWHITES. AT LEAST A REMAND IS IN ORDER TO REVIEW FURTHER DATA FOR ADDITONAL YEARS AND TO HEAR EXPERT TESTIMONY ON YOUNG PEOPLE/ COLLEGE STUDENTS AS COGNIZABLE GROUPS.

A. CONSTITUTIONAL BASIS FOR CHALLENGE/STANDING.

This Court notes that one may challenge the composition of the grand jury panel based only on the equal protection clause of the 14th Amend. and not "the due process requisites of the Fifth and Sixth Amendments." Ford v. Commonwealth, Ky., __ S.W.2d ___ (rendered December 22, 1983); Master Slip Opinion, hereinafter SO, 2. It then concludes that appellant's complaint regarding underrepresentation of women, young adults and college students in the jury pool "does not merit our consideration." Id. This Court's conclusions are contrary to the decisions of the United States Supreme Court.

In Peters v. Kiff, 407 U.S. 493, 496 (1972), the Supreme Court emphasized "both the grand jury and the petit jury in this case must be measured solely by the general Fourteenth Amendment guarantees of due process and equal protection.... [W]e turn now to the commands of equal protection and due process." (emphasis added). Moreover, the defendant in Peters, a white, challenged the exclusion of blacks from the grand jury as well as the petit jury. 407 U.S. at 494. The Court held that "when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim." 407 U.S. at 498.

Appellant's challenge to the grand jury pool was based on both the due process and equal protection clauses of the 14th Amend. Rose v. Mitchell, 443 U.S. 545 (1979) and Castenada v. Partida, 430 U.S. 482 (1977) are not on point since the defendants rasied only equal protection claims and Mitchell involved solely a challenge to the foremen, not the grand jury itself. Alexander v. Louisiana, 405 U.S. 625 (1972) is irrelevant because the court did not reach the standing issue and the decision was prior to Peters. Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983) is a persuasive recent case where a male was permitted to challenge the underrepresentation of women in the grand jury pool and the federal appellate court affirmed the district court's granting of a writ of habeas corpus because the grand and petit juries were unconstitutionally composed.

B. SIGNIFICANT PERIOD OF TIME

This Court additionally held that two years does not constitute a significant period of time "as would satisfy the directives of Moultrie [v. Martin,690 F.2d 1078 (4th Cir. 1982)] and Castenada," Ford, SO at 3-4. Neither Moultrie nor Castenada attempts to define "significant period." However, the United States Supreme Court and the federal circuit courts of appeal have upheld challenges to jury pools based on data for less than two years. Duren v. Missouri, 439 U.S. 357 (1979)(one year); Taylor v. Louisiana, 419 U.S. 522 (1975)(one year); Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982)(20 months). See also Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982)(three years). Moreover, in any event, appellant requested the trial court to provide funds for expert assistance from the National Jury Project if the court believed his proof was deficient (TR VIII 1142-6). Samples for four previous years had been drawn, but data was incomplete (TR VIII 1190-1). The request was denied. At a minimum, appellant had made a sufficient showing to require funds for further data gathering. State v. Anaya, 438 A.2d 892 (Ma. 1981). At least, this Court should remand for further proof at an evidentiary hearing after Ford has been provided assistance to complete the data beyond the two years on file for Franklin County. Moreover, since he does have standing to challenge the underrepresentation of young adults in the grand jury pool, funds for an expert on cognizability are also essential (See II A).

C. POPULATION TO BE USED FOR COMPARISON

Again relying on Moultrie, this Court concluded that the percentage of a group in the jury pool must be compared with

the percentage on the voter and tax rolls. Ford, SO at 4. The Court states that appellant's "basis for comparison ...was the U.S. Census for 1970, which furnished data on the total population of the county, without regard for jury eligibility." Id. Actually, appellant furnished figures only for the adult (over 18) population of the county. This group does constitute the pool for eligible jurors. KRS 29A.080(2) prescribes the qualifications for jury service and being a voter or property tax owner is not required. The voter and tax rolls are simply the master list to be used by the jury commissioners. KRS 29A.040.

Duren is exactly on point. Missouri selected jurors from the voter registration list, and the Missouri Supreme Court questioned the use of census figures since they "might not precisely mirror the percentage of women registered to vote." 439 U.S. at 363. The United States Supreme Court noted that the Missouri court's speculation was "belied by" a census report showing that in the year after Duren was indicted 69.9% of the women and 71.1% of the men in Missouri were registered to vote. 439 U.S. at 365 n.22.1/ Our nations's highest court emphasized:

> In any event, the fair cross-section requirement involves a comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup of the community, not of voter registration lists.

1/A similar report reveals that in Kentucky 71.5% of adult women and 72.3% of adult men were registered to vote as of December 1983. Voter Registration Statistics Report (State Board of Elections December 9, 1983). Moreover, the 1980 Census of Kentucky, now available, reveals that the percentage of women and non-whites in the population has remained nearly steady. Kentucky Demographics: The 1980 Census of Kentucky (January 1982).

439 U.S. at 365 n.23; emphasis in original.

Duren is dispostive and consistent with all other decisions on the subject except Moultrie. In Alexander, 405 U.S. at 627; Castenada, 430 U.S. 582 (1977); Gibson v. Zant, 705 F.2d at 1545 n.2; Machetti, 679 F.2d at 240; Hillery v. Pulley, 563 F.Supp. 1228, 1231-2 (E.D.Ca. 1983) the courts accepted comparison of the jury pools with the adult population contained in the Census. In any event the Franklin County voter registration list of November 4, 1980 was introduced into evidence at the evidentiary hearing conducted December 8, 1981 (Defense Exhibit 1), and the figures this Court has declared to be absent are in fact included in the appellate record (see motion to transmit exhibit filed January 11, 1984).

D. SOURCE LIST CHALLENGE

Sadly, this Court notes in Ford, SO at 5, that appellant has cited only one authority on the deficiencies of the voter list as a source list. Appellant had to eliminate from his original Reply Brief, rejected by this Court because it was longer than ten pages, additional authorities. See Carp, "Federal Grand Juries: How True a 'Cross Section of the Community'", 7 The Justice System Journal No. 2 (1982) and IV Center for Jury Studies Newsletter 6 (Nov. 1982) which strongly support appellant's position. This Court should consider the briefs previously rejected.

II.

THIS COURT HAS MISCONCEIVED BOTH THE LAW AND THE FACTS APPLICABLE TO THE QUESTION OF WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE JURY POOLS FROM WHICH THE PETIT JURY WAS SELECTED SUBSTANTIALLY UNDERREPRESENTED WOMEN, YOUNG ADULTS AND COLLEGE STUDENTS. AT LEAST A REMAND IS IN ORDER FOR EXPERT TESTIMONY ON YOUNG ADULTS AND COLLEGE STUDENTS AS COGNIZABLE GROUPS AND TO REVIEW FURTHER DATA.

A. COGNIZABLE GROUPS

This Court held "young adults and college students, whether we consider them as one group or two, are not distinctive or cognizable as a class." Ford, SO at 6-7. Brown v. Harris, 666 F.2d 782, 783 (2nd Cir. 1981) and United States v. Kleifgen, 557 F.2d 1293, 1296 (9th Cir. 1977) were cited. As stated in appellant's Reply Brief, Brown is not on point. Moreover, two recent cases support appellant's position. In LaRoche v. Perrin, 718 F.2d 500 (1st Cir. 1983), the First Circuit reaffirmed that young adults are a cognizable group. "[W]e do not feel it is necessary to have testimony of psychologists to believe that young persons may have different 'varieties of human experience' and 'perspective[s] on human events.'" Id. at 505. Additionally, the Eleventh Circuit remanded for a hearing on whether young adults aged 18-30 are a distinctive group. Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983). The Georgia Supreme Court had held as a matter of law that they were not a cognizable group. The federal court stated this was a question of fact and Willis should have an opportunity to prove his claim.

Attempting to meet the burden of proving that young adults and students are distinct and identifiable groups, appellant included in his Appendix presented to the trial court excerpts from the testimony of one expert and a paper by another on the topic (TR IX 1201-1273). Dr. John McConahay, professor at Duke University, was qualified as a social psychologist (TR IX 1201-1210). He testified that students are considered a cognizable group by social science researchers, the Census Bureau and other governmental agencies (TR IX 1212). Dr. Abbott L. Ferriss, professor at Emory University, concluded after studying available data that "ample evidence exists that many attitudes and opinions of younger people in the U.S. population differ from those of older people" (TR IX 1214). The opinion polls which he studied showed young people's views differing significantly from older people's, and the young are more likely to oppose the death penalty (TR IX 1216). Appellant submits that his data for Franklin and Scott counties demonstrating a statistically significant underrepresentation of young adults and/or students combined with the evidence on young adults as a cognizable group he presented clearly entitled him, at a minimum, to funds for an expert and a hearing on the subject. A reman is in order.

B. SYSTEM SUSCEPTIBLE TO ABUSE

This Court states that appellant "has demonstrated no selection procedure which is susceptible to abuse or is not racially neutral...." Ford, SO at 8. In fact appellant has repeatedly noted the designations of race, sex and birthdate on the voters lists as well as the small size of Franklin and Scott

Counties. The "key man" system at issue here is precisely the type deemed "susceptible of abuse" in Castenada. Indeed, the "key men" (commissioners) in Franklin and/or Scott County were themselves grossly underrepresented nonwhites, women, young people and college students.

III.

THIS COURT HAS MISCONCEIVED BOTH THE LAW AND THE FACTS RELEVANT TO THE ISSUE OF WHETHER THE TRIAL COURT ERRONEOUSLY DENIED FUNDS FOR EXPERT ASSISTANCE.

Relying on appellee's erroneous brief, this Court mistakenly frames the issue as whether appellant "was improperly denied funds for the employment of an additional statistician." Ford, SO at 8. Appellant made no such request. He did move for funds for employment of data gathers to pick and collect information on additional samples as well as an expert on young people as a cognizable group if the court concluded he had not met his burden of proof. He did not move for a "second opinion" from a statistician as this Court should know from the record.

In dictum this Court states that KRS 31.110 does not authorize employment of statisticians and mathematicians to examine the representation of cognizable groups on venires "to be included in 'necessary services.'" Ford, SO at 8. Of course, the trial court in this case did authorize employment of a statistician to analyze data and present testimony once appellant alleged that he believed his figures would demonstrate a prima facie case. Several other trial judges throughout the Commonwealth have likewise authorized the expenditure of funds

for statistical analysis. Certainly this was not a "witch hunt." Ford, SO at 8. Appellant had cold, hard facts to back up his request for funds for a statistician to which he was constitutionally entitled. Undoubtedly, a defendant of means would have hired such an expert in this situation. Appellant urges this Court to omit from its opinion the ill-advised dictum about the applicability of KRS 31.110 to such requests.

IV.

THIS COURT SHOULD REHEAR THE ENTIRE CASE, ESPECIALLY THE ISSUES SURROUNDING DAVID ALFORD'S TESTIMONY, OR AT LEAST CORRECT FACTUAL MISTAKES.

Louis Ford has been denied due process by this Court's brief-page limitations. Perhaps this accounts for the various mistakes in the opinion. (See pages 7-8). For example, the "knife" (SO 9) in the laundry could not have been the murder weapon and has nothing to do with this case (Issue XIV). The prosecutor so admitted (A 30). For example, Alford was asked about the location of the skin and did "deliberately" mislead counsel McNally about "comparative measurements" (SO 11) as any fair reading of Alford's deposition would reveal. "Where exactly..." was the skin, he was asked. Did you look at the skin "under a microscope?" Alford could only pinpoint a "general area" (DA 5-6, 18). "[W]hat test did you decide to do on the skin?" (DA 41) Alford answered "no" when asked if there was "anything else from your crime scene evaluation, or scientific tests..." indicative of guilt? (A 85; emphasis added). But there was another "test" not declared and the false answer was

"deliberate." How could counsel McNally specifically ask about "comparative measurements" when no such scientific field existed until this case (Kasdan deposition)?

This Court did not address various important issues (IX-XVIII). This Court should do so now. At least, this Court should reach the issue of Alford's notes (IX) which would have revealed his falsehood regarding comparative measurements and generally aided in cross-examination. Likewise, why couldn't Fod have his expert present when Alford was cross-examined? These are important, well-preserved issues this Court needs to reach. They are matters of first impression. Finally, this court should reevaluate the Hitch argument (not Brody, SO 11-12) because the United States Supreme Court granted ceriorari on this issue yesterday. California v. Trombetta, 142 Cal.App.3d 138 (1983), cert. granted (January 9, 1983). At least the opinion could mention the police threw out the victim's blood before Ford's expert could examine it and that there are cases supporting Ford's position which are directly on point.

CONCLUSION

For the reasons set forth in this Petition for Rehearing, appellant respectfully requests this Court to reverse his conviction or to order rehearing with further briefing and oral argument.

Respectfully submitted,

M. GAIL ROBINSON
ASSISTANT PUBLIC ADVOCATE

KEVIN MICHAEL McNALLY
ASSISTANT PUBLIC ADVOCATE

Supreme Court of Kentucky

82-SC-431-MR

LOUIS M. PARKER FORD — APPELLANT

V. — APPEAL FROM SCOTT CIRCUIT COURT
HON. ROBERT HALL SMITH, JUDGE
NO. 81-CR-036

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

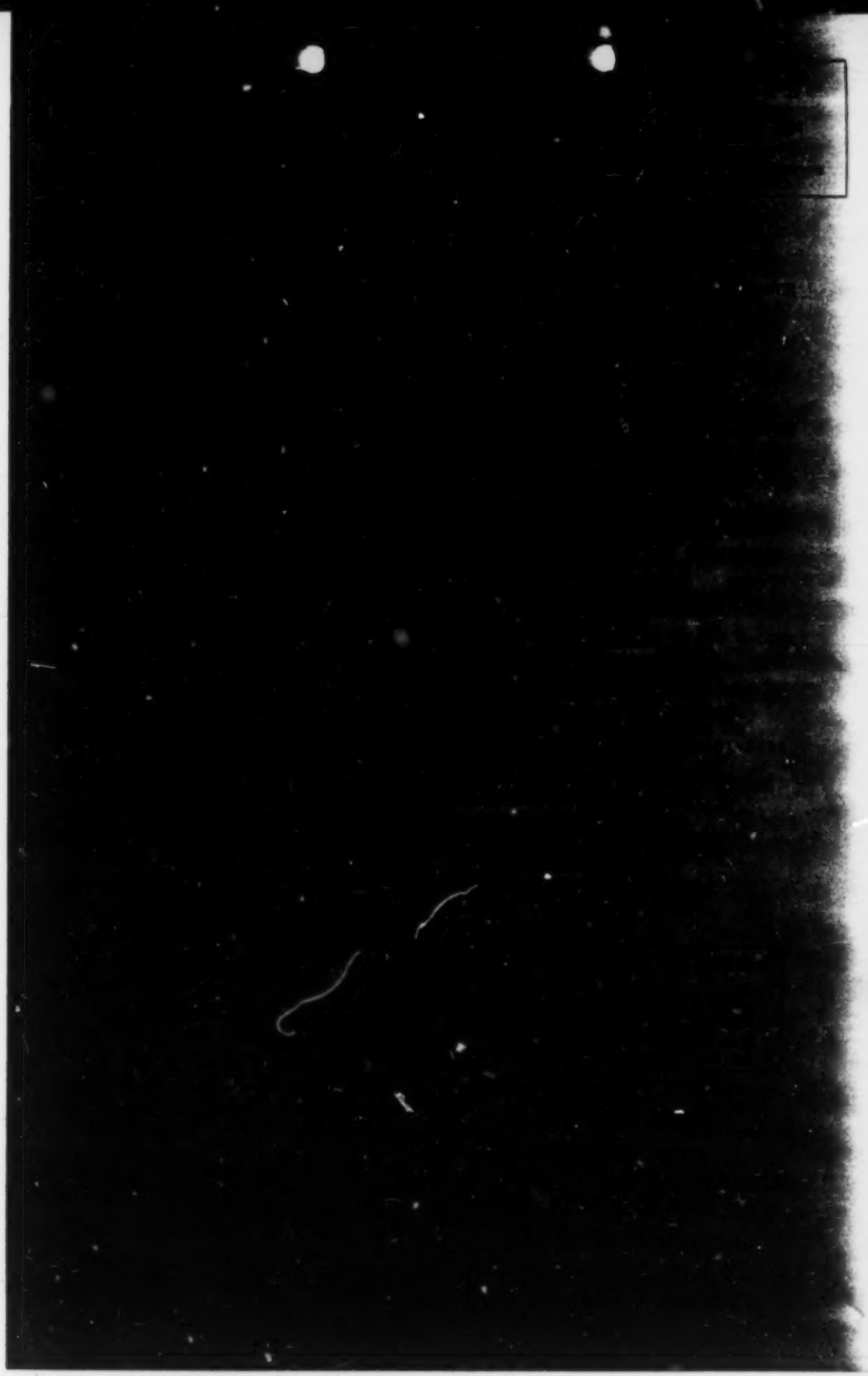
Appellant's petition for rehearing is denied.

All concur.

ENTERED March 29, 1984.

Robert F. Stephens
Chief Justice

OPPOSITION BRIEF



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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

WHETHER PETITIONER, A 51 YEAR OLD BLACK MALE PRISON INMATE, HAS DUE PROCESS STANDING TO CHALLENGE COMPOSITION OF THE GRAND JURY POOL FOR ALLEGED UNDERREPRESENTATION BLACK COLLEGE STUDENTS, WOMEN, AND YOUNG ADULTS?

II.

WHETHER STATISTICS PREPARED BY PETITIONER SHOW A SYSTEMATIC EXCLUSION OF WOMEN AND YOUNG ADULTS IN THE SELECTION OF JURY COMMISSIONERS, CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT?

III.

(A) WHETHER STATISTICS PREPARED BY PETITIONER SHOW A SIGNIFICANT UNDERPREPRESENTATION OF COGNIZABLE GROUPS IN THE GRAND AND PETIT JURY POOLS AND AS JURY COMMISSIONERS?

(B) WHETHER IN LIGHT OF THE SHOWING PETITIONER HAS MADE, HE WAS ENTITLED TO ADDITIONAL FUNDS FOR AN ADDITIONAL EXPERT STATISTICIAN?

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NO. 83-6816

IN THE
SUPREME COURT OF THE UNITED STATES

LOUIS M. PARKER FORD — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

MAY IT PLEASE THE COURT:

The Respondent, the Commonwealth of Kentucky, respectfully submits that the petition for writ of certiorari to review the opinion of the Supreme Court of Kentucky should be denied.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered December 22, 1983 and is published at 665 S.W.2d 304. The request of Petitioner for a rehearing of the appeal was denied by order entered March 29, 1984. Copies of the opinion and order below are included in Petitioner's Appendix.

JURISDICTION

The jurisdictional requisites are adequately set out in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. All three such provisions are set out in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Kentucky Revised Statutes (KRS) 29A.030, 29A.040, 29A.050, 29A.080, 29A.090, and 31.110.

COUNTERSTATEMENT OF THE CASE

Respondent does not accept the Petitioner's Statement of the Case. For the sake of brevity, Respondent adopts the facts contained in the opinion below. Respondent presents additional facts in the argument portion of this response.

ARGUMENT

I.

THE COURT BELOW PROPERLY HELD THAT THE CONSTITUTIONAL BASIS FOR CHALLENGING GRAND JURY COMPOSITION IS NOT DUE PROCESS BUT EQUAL PROTECTION AND THEREFORE THAT PETITIONER LACKS STANDING TO CHALLENGE ALLEGED UNDERREPRESENTATION OF GROUPS TO WHICH HE DOES NOT BELONG.

Petitioner challenges the indictment returned by the Franklin County Grand Jury. As grounds for his challenge, Petitioner claims that the pool from which the grand jury was selected did not fairly represent a cross-section of the Franklin County community. Specifically, Petitioner charges that Kentucky State University (KSU) students were excluded from and that women and young adults were substantially underrepresented in the grand jury pool.

Although the Constitution guarantees the right to trial by jury, it does not require indictment by grand jury in state criminal cases. Hurtado v. California, 110 U.S. 516, 3 S.Ct. 473, 28 L.Ed. 47 (1884). Nor does the Constitution guarantee a grand jury array which mirrors the economic, sexual, educational, or ethnic composition of society in those instances where the state chooses to provide indictment by

grand jury. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 795 (1965). Where, as here, the state empanels a grand jury, the equal protection clause of the Fourteenth Amendment assures a criminal defendant that members of an identifiable group to which he belongs will not be substantially underrepresented in the grand jury venire. Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).

The Court has explained the grounds for a challenge to the grand jury lies not in the due process clause, but in the equal protection clause of the Fourteenth Amendment. Castaneda v. Partida, supra at 493, 1279, 509; Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2293, 61 L.Ed.2d 738 (1979). In Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972) the Court, in addition to finding that a male petitioner had not been denied equal protection by the exclusion of women from grand jury service, explained:

> Although the Due Process Clause guarantees petitioner a fair trial, it does not require the states to observe the Fifth Amendment provisions for presentation or indictment by a grand jury. 405 U.S. at 633.

This jurisdictional principle has been recognized by lower courts as well. In Villafane v. Manson, 504 F.Supp. 78 (D.Conn. 1980) the Court stated:

> A challenge to the composition of state grand juries, unlike a challenge to the petit jury involves only the fourteenth amendment equal protection clause. No fifth or sixth amendment due process consideration are involved. 504 F.Supp. at 82, n.6.

To the same effect, see Commonwealth v. Bastarche, Mass., 414 N.E.2d 984 (1980) at 987 and 991; Beal v. Rose, 532 F.Supp. 306 (M.D. Tenn. 1981) at 309-311; State v. Coe, Tenn., 655 S.W.2d 903 (1983) at 910.

Petitioner fails to identify a conflict among the lower federal and state courts on this issue. The only lower court decision he offers to establish such a conflict is Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983), which the Respondent considers harmonious with the foregoing authorities insofar as Gibson v. Zant recognizes the different principles involved. 705 F.2d at 1546.

The other authority in which Petitioner relies, Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 53 (1972), addressed challenges to the grand and petit juries on statutory and due process grounds without reaching the equal protection claim. 407 U.S. 497, n.5. At least one federal court has considered Peters v. Kiff consistent with Castenada v. Partida, supra. See Beal v. Rose, supra at 309-311.

The grounds for Petitioner's challenge to the grand jury lie only in the Equal Protection Clause of the Fouteenth Amendment.

In order to press an equal protection claim of alleged discrimination against members of a particular group, the person must be a member of that group. Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed.2d 1586 (1953). Petitioner is not a woman, young adult, or college student. He therefore lacks standing to challenge the alleged underrepresentation of those groups.

II.

THE STATISTICS PREPARED BY PETITIONER FAIL TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION AGAINST WOMEN, YOUNG ADULTS, OR BLACK PERSONS IN THE SELECTION OF JURY COMMISSIONERS.

In Kentucky, the circuit judge appoints three jury commissioners each year to call veniremen from the county. KRS 29A.030, 29A.050. At the time of Petitioner's trial, KRS

29A.040 required that the source lists be made up from voter registration lists and property tax rolls. Effective October 1, 1982, months after the entry of Petitioner's sentence, the source lists must consist solely of the voter registration lists. KRS 29A.030.

Franklin County is approximately 53% fem[illegible], 9% Black, and 28% "young adults", according to Petitioner. There were 63 jury commissioners appointed in Franklin County between 1960 and 1980, inclusive, of whom all were white and four were female. The record does not disclose the number of "young adults" appointed during this period of time. (Transcript of Record, hereinafter TR, Vol.X, 1349-1350).

Castaneda v. Partida, supra, outlines the essential components of a prima facie case of discrimination:

> The first step is to establish that the group is one that is a recognizable distinct class, singled out for different treatment under the laws, as written or applied.
>
> . . . . .
>
> Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time.
>
> . . . . .
>
> Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. 430 U.S. at 494.

The standard deviation formula to be applied is set out in Moultrie v. Martin, 690 F.2d 1078 (4th Cir. 1982) at 1083, n.8.

Cognizable Groups

Although clearly women and non-whites are cognizable groups, Respondent disagrees with Petitioner's contention that

college students and young adults are distinctive, opinion-shaped groups. With the exception of United States v. Butera, 420 F.2d 564 (1st Cir. 1970), the majority of federal courts have refused to recognize young adults as an identifiable class.[1/] Brown v. Harris, 666 F.2d 782 (2nd Cir. 1981) lists the circuits which have adopted this position. The court in United States v. Kleifgen, 557 F.2d 1293 (9th Cir. 1977) observed that:

> These groups [young adults and non-college students] have no internal cohesion nor are they viewed as a cognizable class by the general populace. Moreover, their members have diverse attitudes and characteristics which defy classification. 551 F.2d at 1296.

The same may be said of college students. State v. Porro, N.J., 385 A.2d 1258 (1978), cert. den. 439 U.S. 1047, 99 S.Ct. 724, 58 L.Ed.2d 706 (1978).

The Selection Procedure

Kentucky's statutory provision for court appointment of jury commissioners is neutral on its face. The failure of Petitioner to offer any evidence concerning the actual selection process, such as testimony by the judges or the former commissioners, is a fatal defect in his claim. In

---

1/. United States v. Butera has been described as a "judicial rarity" in Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975) at 824.

Carter v. Jury Commissioners of Greene County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), the claim of discrimination failed for want of proof, even though it had been shown that nearly two thirds of the county population was non-white and that no Black person had been appointed in the twelve years preceding the lawsuit. The Court held that the absence of a particular group does not in and of itself constitute a prima facie case of discrimination. Likewise, even though the Petitioner in the case at bar has shown an absence of Black persons from the jury commission, his claim must fail since he presented no evidence concerning the selection process itself.

III.

(A) THE STATISTICS PREPARED BY PETITIONER FAIL TO ESTABLISH A SYSTEMATIC EXCLUSION OF COGNIZABLE GROUPS FROM THE GRAND AND PETIT JURY POOLS AND AS JURY COMMISSIONERS

(B) IN LIGHT OF THE SHOWING PETITIONER HAS MADE, HE WAS NOT ENTITLED TO ADDITIONAL FUNDS FOR AN ADDITIONAL EXPERT STATISTICIAN.

The failure of Petitioner to demonstrate a systematic exclusion of cognizable groups from the grand jury pool and commission has been discussed hereinbefore.

With regard to the challenge to the petit jury pool, the statistics prepared by Dr. Edgell, Petitioner's expert statistician, suffer fatal flaws.

First, the test set out in Castaneda v. Partida, supra, requires a comparison of the proportion of the group in the total population to the proportion of the group called to serve over a significant period of time. 430 U.S. at 494. While the Petitioner has introduced proof of the proportion of the various groups in the eligible Franklin County population,

he has not come forth with evidence of the actual number of women, non-whites, or young adults called to serve. Instead, the Petitioner has offered only the number of women, non-whites, and young adults found in a group of 100 from 628 names drawn from the jury drum in 1980 and a group of 98 from 457 drawn in 1979. (TR, 117-1174, 1188 and Transcript of Pre-Trial Hearings, 218.) In effect, the Petitioner's proof consists of a comparison of the proportion of these groups in the total population with the proportion of the groups found in less than 1/6 of those called to serve in 1980 and less than 1/4 of those called to serve in 1979. The statistical conclusions reached by Dr. Edgell are contaminated as a result.

Next, the Petitioner's random sampling of only two years does not constitute a "significant" period of time.

In Castaneda v. Partida, supra, a period of eleven years was considered significant. 430 U.S. at 495. However, in Moultrie v. Martin, supra, a six year period was found to be insignificant. 690 F.2d at 1081. And in Rose v. Mitchell, supra, this Court considered two years, the very period offered by the Petitioner here, an insignificant period of time. 443 U.S. at 570.

Another reason why Petitioner's statistics are defective is his failure to use the proper source lists as the basis for comparison. KRS 29A.040, as then in effect, directed that the source lists consist of the voter registration lists and the property tax rolls. Instead of these, the Petitioner based his comparisons upon the 1970 census.

Finally, the Petitioner has failed to offer any proof concerning the actual selection process, such as testimony by the jury commissioners. The Kentucky statutes governing the

jury selection process are facially neutral, as they do not contain the automatic exclusions denounced in Duren v. Missouri, 437 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). Therefore, if any exclusion occurs, it does not appear to be systematic. Statistical evidence simply is not enough to prove this kind of claim. United States v. Clifford, 640 F.2d 150 (8th Cir. 1981).

In view of the foregoing legal and mathematical defects in the statistics offered by the Petitioner, the trial court properly denied his request for additional funds to employ an additional expert to gather further data.

CONCLUSION

In view of the foregoing, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the Respondent's Brief in Opposition to Petition for Writ of Certiorari has been served by mailing a true copy thereof to Hon. Kevin Michael McNally, and Hon. M. Gail Robinson, Assistant Public Advocates, 151 Elkhorn Court, Frankfort, Kentucky 40601, Counsel for Petitioner, on this the 28th day of August, 1984.

David A. Smith
Assistant Attorney General

REPLY BRIEF

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NO. 83-6816

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

LOUIS M. PARKER FORD,
PETITIONER

vs.

COMMONWEALTH OF KENTUCKY,
RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

REPLY BRIEF

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PURPOSE OF REPLY BRIEF

Petitioner believes this Reply Brief is necessary to distinguish legal authority contained in the Brief for Respondent in Opposition to Petition for Writ of Certiorari and to discuss the relevance of Hobby v. United States, _ __ U.S. ____, 104 S.Ct. 3093 (1984), decided since he filed his Petition, to his case.

QUESTIONS PRESENTED

I.

PETITIONER, A 51 YEAR OLD BLACK MALE, HAS STANDING TO CHALLENGE THE 1) TOTAL EXCLUSION OF BLACK COLLEGE STUDENTS FROM AND 2) SUBSTANTIAL UNDERREPRESENTATION OF WOMEN AND YOUNG ADULTS IN THE GRAND JURY POOL.

Respondent states that this Court "has explained the grounds for challenge to the grand jury lies not in the due process clause, but in the equal protection clause of the Fourteenth Amendment" (Brief in Opposition, hereinafter BO, 3). Respondent relies on Castaneda v. Partida, 430 U.S. 482, 493 (1977); Rose v. Mitchell, 443 U.S. 545 (1979), and Alexander v. Louisiana, 405 U.S. 625, 633 (1972)(BO 3). This Court reached no such conclusion in Castaneda or Mitchell; it simply dealt with the claim--an equal protection one--pressed by each petitioner. This Court's observation in Alexander that the states need not observe the Fifth Amendment requirement of an indictment is irrelevant since Kentucky did so in petitioner's case.

Respondent cites Villafane v. Manson, 504 F.Supp. 78 (D.Conn. 1980), Commonwealth v. Bastarche, 414 N.E.2d 984 (Mass. 1980) and Beal v. Rose, 532 F.Supp. 306 (M.D.Tenn. 1981), vacated and remanded, 703 F.2d 558 (6th Cir. 1982)(Mem.) to support his contention that a challenge to grand jury composition must be based solely on the equal protection clause (BO 3). Villafane concerned only an equal protection claim, and respondent relies on dictum in a footnote. In Bastarche the defendant conceded that only the Fourteenth Amendment equal protection clause was applicable, a concession Ford does not make. And Beal, which dealt with a challenge solely to the grand jury foremen, not the grand jury pool, has no precedential value since it was vacated by the Sixth Circuit (which respondenty did not note in his Brief).

Respondent claims that Gibson v. Zant, 705 F.2d 1543 (11th Cir. 1983) is "harmonious with" State v. Coe, 655 S.W.2d 903 (1983) becaus Gibson "recognizes the different principles involved" (BO 4). While the Eleventh Circuit noted the different tests for equal protection and cross section claims, it did permit a white male to challenge the underrepresentation of blacks and females in the jury pool. Barrows v. Jackson, 346 U.S. 249 (1953) is cited by the Commonwealth for the proposition that a person must be a member of a particular class to press an equal protection claim concerning exclusion of that group. The case does not lend support to that principle.

Since Ford filed his petition this Court has issued its decision in Hobby v. United States, 104 S.Ct. 3093 (1984). In Hobby a white male challenged the exclusion of blacks and females as grand jury foremen. The Court held that even if discrimination had occurred dismissal of the indictment was too extreme a remedy when the forbidden behavior was directed only at a single individual rather than the grand jury as a whole. 104 S.Ct. at 3096-3097. Significantly, the Court emphasized repeatedly that Hobby's challenge was based on due process, not equal protection:

> Petitioner, however, has alleged only that the exclusion of women and Negroes from the position of grand jury foreman violates his right to fundamental fairness under the Due Process Clause. 104 S.Ct. at 3098.

The Court never hinted that a due process challenge to grand jury composition would not lie or that Hobby, a white male, lacked standing to challenge the exclusion of blacks and females from the post of foreman. Hobby lends further support to Ford's request that the Kentucky Supreme Court's decision denying him standing must be reviewed.

II.

THE EXCLUSION OF BLACKS AND/OR SUBSTANTIAL UNDERREPRESENTATION OF WOMEN AND YOUNG ADULTS AS JURY COMMISSIONERS FOR A 20 YEAR PERIOD IN THE COUNTY OF INDICTMENT AND A 10 YEAR PERIOD IN THE COUNTY OF TRIAL IS CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Significantly, respondent does not contest that discrimination in the appointment of grand jury foremen constitutes a constitutional violation (BO 4-7). However, the Kentucky Supreme Court, which condemned Ford's "attempt to place the stamp of discrimination by reference to the color (white) of the jury commissioners" as without "substance or merit" (A 5) may have had doubts about the validity of such a claim. The Commonwealth disputes the technical underpinnings of Ford's challenge--whether one of the three groups underrepresented (young adults)[1] is cognizable and whether his proof was sufficient.

With respect to the cognizability of young adults, petitioner directs this Court's attention to two recent cases. In LaRoche v. Perrin, 718 F.2d 500 (1st Cir. 1983), the First Circuit reaffirmed that young adults are a cognizable group.[2] "[W]e do not feel it is necessary to have testimony of psychologists to believe that young persons may have different 'varieties of human experience' and 'perspective[s] on human events.'" Id. at 505. Additionally, the Eleventh Circuit remanded for a hearing on whether young adults aged 18-30 are a distinctive group. Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983), cert. denied, 82 L.Ed.2d 849 (1984). The Georgia Supreme Court had held as a matter of law that the group was not cognizable. The federal court stated this was a question of fact and Willis should have an opportunity to prove his claim.

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[1]The Commonwealth states that the record does not disclose the number of young adults appointed as Franklin County jury commissioners (BO 5). The data submitted by Ford was incomplete since he had been unable to ascertain the ages of some commissioners. Very few whose ages he did learn were under 30. Funds to complete the challenge were denied.

[2]That Court first so held in United States v. Butera, 420 F.2d 564 (1st Cir. 1970).

Petitioner presented to the trial court in an Appendix excerpts from the testimony of one expert and a paper and testimony by another on young adults/students as cognizable groups (TR IX 1201-1273). He also requested funds for an expert to provide live testimony for the trial court. Certainly his data for Scott County showing exclusion of young adults on the jury commissions for a decade at least entitled him to funds for an expert and a hearing on cognizability.

In any event women were substantially underrepresentation in both counties and blacks were excluded in Franklin County over an extended period. The cognizability of young people is in no way critical to Ford's claim.

Respondent finally claims that petitioner could not rely on statistics to prove his case and that testimony from the judges or commissioners was essential (BO 6-7). The Commonwealth made no such claim at the trial level and should not be allowed to advance this position now. Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) is cited by respondent to support his position (BO 7). However, Carter is clearly distinguishable. The issue the plaintiffs had presented to the District Court was that there was deliberate racial discrimination by the Governor who appointed the commissioners. 396 U.S. at 328. Plaintiff's counsel "conceded that he could not prove his charge of discriminatory selection without the testimony of the Governor," nonetheless, counsel failed to call the Governor as a witness. This Court held that the concession may have led the defendants to believe they did not need to present proof. Id.

Contrastingly, petitioner urged that his data regarding the characteristics of the jury commissioners appointed by the trial court was compelling enough to require a response by the Commonwealth; if the Commonwealth believed the circuit judges could provide an innocent explanation for the total absence of blacks in Franklin County and striking scarcity of women and young adults in Franklin and Scott Counties, it should have called them as witnesses at the hearing. It failed to do so, and petitioner's prima facie case was unrebutted.

III.

PETITIONER PRESENTED PRIMA FACIE CASES OF EXCLUSION/SERIOUS UNDERREPRESENTATION OF COGNIZABLE GROUPS IN THE GRAND AND PETIT JURY POOLS AND AS JURY COMMISSIONERS IN FRANKLIN AND SCOTT COUNTIES OR, AT A MINIMUM, MADE A SUFFICIENT SHOWING TO REQUIRE THAT FUNDS FOR ADDITIONAL DATA GATHERING AND AN EXPERT ON COGNIZABILITY BE GRANTED.

Apparently, the representatives of the Commonwealth do not understand the concept of random sampling. Respondent urged on direct appeal and claims before this court that the statistician's conclusions were "contaminated" because they were based on random samples of the jury pools (BO 7-8). He is incorrect. Dr. Edgell testified about this specific point at the evidentiary hearing and was not challenged by the prosecutor. The samples drawn by Ford were random, meaning "an equal likelihood of all persons in the population [jury pool] being...in the sample" (TH II 244-247). Ironically, using random samples of 100 works in favor of the Commonwealth since only the grossest differences will appear in a sample of that size (TH II 242-243).

The Commonwealth also disputes the validity of sampling for a two year period, claiming that Moultrie v. Martin, 690 F.2d 1078 (4th Cir. 1982) found six years to be an insignificant period and Rose v. Mitchell, 443 U.S. 545 (1979) held two years was insignificant (BO 8). He is in error about both cases. The Moultrie court declined to review the petitioner's evidence about only one year rather than the six year period concerning which he had offered proof; it in no way indicated that six years was not a significant period. 690 F.2d at 1081. This Court in Mitchell, a grand jury foreman case, found the petitioner's proof insufficient because of vague testimony about the number of years concerning which witnesses had knowledge and the absence of evidence about the number of foremen in question. 443 U.S. at 569-571. The Court did not hold two years is an insignificant period of time when a petitioner claims discrimination in the jury pool itself rather than appointment of foremen.

Respondent ignores Duren v. Missouri, 439 U.S. 357, 365 n.22 (1979); Alexander, 405 U.S. at 627, Castaneda, 430 U.S. at 495; Gibson, 705 F.2d at 1545 n.2 and urges that Ford was required to compare the characteristics of the jury pool with those of the voter and tax lists rather than the census data (BO 8). The cited cases are in conflict with Ford and should be dispositive.

Finally, respondent ignores the susceptability of the Kentucky jury selection system to abuse and urges "statistical evidence simply is not enough to prove this kind of claim. United States v. Clifford, 640 F.2d 150 (8th Cir. 1981)" (BO 9). The voter registration list, one of the source lists required by KY REV. STAT. 29A.040(1), contains sex, race and date of birth of each voter. Clifford is not on point since a random sampling system was at issue, and the defendant conceded there was no opportunity to discriminate. 640 F.2d at 155. Ford's proof is comparable to that in Castenada--statistics concerning underrepresentation combined with a system providing the opportunity to discriminate.

Petitioner relied on the decisions of this Court in collecting/presenting data which he believed to constitute a prima facie case of unconstitutional exclusion/underrepresentation of cognizable groups. The Kentucky Supreme Court's Ford decision is inconsistent with the opinions of this Court and other courts and should be reviewed.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and this Reply Brief, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin Michael McNally, counsel for petitioner, certify that the attached Reply Brief was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and to counsel for respondent, Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 24th day of September, 1984, by personally mailing same in a United States mail box, first-class postage prepaid.

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OPINION

SUPREME COURT OF THE UNITED STATES

BRUCE H. THOMPSON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83–6809. Decided November 13, 1984

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

Once again this Court is confronted with a challenge to the constitutionality of the Government's use of peremptory challenges to exclude potential jurors in a criminal trial because of their race. See *Swain* v. *Alabama*, 380 U. S. 202, 221 (1965) ("We cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws.").* The continued vitality of *Swain* is by now a "distressingly familiar" issue to this Court. *Williams* v. *Illinois*, decided with *Dixon* v. *Illinois* and *Yates* v. *Illinois*, —— U. S. —— (1984) (MARSHALL, J., dissenting from denial of certiorari); see *McCray* v. *New York*, decided with *Miller* v. *Illinois* and *Perry* v. *Louisiana*, 461 U. S. —— (1983) (MARSHALL, J., dissenting from denial of certiorari); *Gilliard* v. *Mississippi*, —— U. S. —— (1983) (MARSHALL, J., dissenting from denial of certiorari). A majority of the Court has expressed the position that this question merits plenary review. See *McCray*, *supra*, at —— (Opinion of STEVENS, J., joined by BLACKMUN and POWELL, JJ.); *id.*, at —— (MARSHALL, J.,

*Petitioner Thompson, convicted of federal counterfeiting charges, challenges his conviction on the ground that the Government used peremptory challenges to exclude five of seven Negro potential jurors. When defense counsel raised the objection at the close of voir dire, the Assistant United States Attorney stated on the record that she had used race as a criterion in excluding the five Negro jurors. The district court rejected the challenge on the basis of *Swain* v. *Alabama*, 380 U. S. 202 (1965), and the Eighth Circuit affirmed with some reluctance. 730 F. 2d 82, 85 (1984).

joined by BRENNAN, J., dissenting from denial of certioriari). The call to reconsider *Swain*, from both courts and scholars, continues unabated. It is time for this Court to face up to the issue.

JUSTICE MARSHALL has written persuasively concerning the immediate need to reconsider *Swain* in light of *Duncan* v. *Louisiana*, 391 U. S. 145 (1968) and *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), which found the Sixth Amendment's jury trial guarantees applicable to the states through the Fourteenth Amendment. See *McCray* v. *New York*, *supra*, at —— (MARSHALL, J., dissenting from denial of certiorari); *Gilliard* v. *Mississippi*, *supra*, at —— (MARSHALL, J., dissenting from denial of certiorari). I add my voice here simply to make two points. First, however plausible the rationale of *Swain* may have seemed two decades ago, the justification for shielding peremptory challenges from equal protection scrutiny has not withstood the test of time. *Swain* thus should be reconsidered for equal protection as well as Sixth Amendment reasons. Second, the admirable intent of three of my colleagues in acknowledging the import of the issue but deferring our review "to allow the various states to serve as laboratories in which the issue receives further study," see *McCray*, *supra*, at —— (Opinion of STEVENS, J., joined by BLACKMUN and POWELL, JJ.), has spawned confusion not clarification in the courts below.

I

Swain is an anomaly, a departure from two fundamental principles of constitutional law. The first is the basic equal protection notion that government officials cannot exclude persons from juries solely because of their race. "It is well known that prejudices often exist against particular classes in the community which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection [a jury of peers] which others enjoy." *Strauder* v. *West Virginia*, 100 U. S. 303, 308–309 (1879). The second is the basic notion inherent in the "American tradition of trial by jury" that "[j]ury competence is an individual rather than a group or class matter. That fact lies at the heart of the jury system. To disregard it is to open the door to class distinctions and discrimination which are abhorrent to the democratic ideals of trial by jury." *Thiel* v. *Southern Pacific Co.*, 378 U. S. 217, 220 (1946). Notwithstanding the force of these principles, five members of the Court in *Swain* (of whom I was one) held that the prosecution's right to use peremptory challenges in any particular case involving a Negro defendant had to remain free of equal protection scrutiny. After acknowledging the impressive pedigree of the peremptory challenge, we held that such challenges are frequently

> ". . . exercised on grounds thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations . . . .
>
> "With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 380 U. S., at 220–221.

With the hindsight that two decades affords, it is apparent to me that *Swain*'s reasoning was misconceived. Stripped of its historical embellishments, *Swain* holds that the state may presume in exercising peremptory challenges that only white jurors will be sufficiently impartial to try a Negro defendant fairly. In other words, *Swain* authorizes the presumption

that a Negro juror will be partial to a Negro defendant simply because both belong to the same race. Implicit in such a presumption is profound disrespect for the ability of individual Negro jurors to judge impartially. It is the race of the juror, and nothing more, that gives rise to the doubt in the mind of the prosecutor. Whatever the justification for permitting the idiosyncratic use of peremptory challenges in the run of cases, that justification ought not extend to permit the Government to make use of an unfounded racial presumption that disparages Negroes in this way. Cf. *Palmore* v. *Sidoti*, —— U. S. ——, —— (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.").

II

In *McCray* v. *New York*, 461 U. S. —— (1983), five members of the Court suggested that *Swain* should be reconsidered. Three of these five went on to suggest a preference for deferring review to permit experimentation in the state courts, presumably in a state constitutional law context, regarding how allegations of race-based use of peremptory challenges should be raised and considered. The decision to defer review has not produced the desired *state law* experimentation in the state courts. See *Gilliard* v. *Mississippi*, —— U. S. ——, —— (1984) (MARSHALL, J., dissenting from denial of certiorari). Instead it has thrown the status of *Swain* as a matter of federal constitutional law into considerable doubt in the lower courts. Some courts appear to have read our opinions in *McCray* as an invitation to depart from *Swain* as a matter of federal law, *e. g.*, *McCray* v. *Abrams*, 576 F. Supp. 1244 (ED N. Y. 1984), while others have declined to depart from *Swain*, *e. g.*, *King* v. *County of Nassau*, 581 F. Supp. 493 (ED N. Y. 1984). Even the courts reaffirming *Swain* have felt compelled to reconsider it at length in light of this Court's *McCray* decision. *Id.*; see also *People* v. *Charles*, 61 N. Y. 2d 321, 462 N. E. 2d 118 (1984). The

piecemeal erosion of *Swain*—whose rule, if without other virtue, was at least clear—will continue until this Court acts to resolve the uncertainty.

III

The time is ripe to reconsider *Swain*. The erosion of *Swain*'s constitutional legitimacy and the dearth of creative state law development counsel against further delay in resolving this important question. Declining to review this case, we let stand a conviction in which we know that the prosecuting attorney excluded individual potential jurors because they were Negroes. This official use of disparaging racial classification is so at odds with our most basic understandings of equal protection that we should not sanction it in this case or any other. I think we have a responsibility to resolve this important and recurring constitutional issue, and I respectfully dissent from this Court's refusal to do so.